Office - Supreme Court, U.S.
FILED
MAY 21 1982
ALEXANDER L. STEVAS,
CLERK

81-2158

NO.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Cross-Petitioner,

v.

UNIROYAL, INC.,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRUCE D. BROOKE
Memphis, Tennessee

Attorney for Cross-Petitioner

OF COUNSEL:

NEELY, GREEN & FARGARSON
60 North Mid-America Mall
12th Floor
Memphis, TN 38103
(901) 523-2500

QUESTION PRESENTED

Whether the Seventh Amendment Constitutional right to a jury trial has been violated when the District Court approved jury award of damages for loss of future profits in an antitrust case has been re-examined and remitted by the reviewing Court of Appeals.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

ORDERS BELOW AND JURISDICTION 1

STATUTES INVOLVED 2

STATEMENT OF THE CASE 3

A. Nature of the Case and Disposition by the United States Court of Appeals for the Sixth Circuit 3

B. The Principal Parties 3

C. Memphis Trade Area 4

D. Partners for Profit Program 4

E. Skaines' Performance and Growth 6

F. Harold Friend's Agreement with Uniroyal 7

G. Uniroyal's Prior Knowledge of the Detrimental Effect of Friend's Operation on Competition with Other Uniroyal Dealers 8

H. The Like Grade and Quality of Uniroyal's Peerless, Uniroyal, Guardian and Guardian Premium Labeled Tires 9

I. The Anticompetitive Effect of Uniroyal's Price Discrimination Advantages to Friend 10

J. Complaints to Uniroyal About the Price Discrimination Favoring Friend 11

Page

K. Skaines Attempt to Compete and Uniroyal's Takeover of Skaines' Business and the Market 13

L. The Dealer's Damages 15

REASONS TO GRANT THE WRIT 17

I. The Seventh Amendment Right to a Jury Trial cannot be Infringed upon by a Federal Appellate Court Re-examining and Remitting a Jury Verdict Awarding Loss of Future Profits when there is Sufficient Evidence upon which the Jury has Based its Verdict. 17

II. The Jury's Special Verdict Award for damages for Loss of Future Profits was Supported by Substantial Evidence and was well within the Maximum Range of Reasonableness. 19

CONCLUSION 27

APPENDIX:

1. United States Court of Appeals for the Sixth Circuit Amended Order filed January 22, 1982 ..... A-1

2. United States District Court for the Western District of Tennessee

   Order Awarding Attorneys Fees, Statutory Damages, and Judgment on the Verdict filed February 22, 1980 ..... A-7

3. Ruling on Defendant's Motion for Judgment N.O.V. or a New Trial or Remittitur filed February 22, 1980 ..... A-10

TABLE OF AUTHORITIES

CASES: Page

Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959) 17

Bigelow v. RKO Pictures, 327 U.S. 251 (1946) 19, 21, 24, 25

Brewer v. Uniroyal, Inc., 498 F.2d 973 (6th Cir. 1974) 14, 18, 25

Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962) 17

Duncan v. Duncan, 377 F.2d 49 (6th Cir. 1967) 17

Fleitman v. Welsbach St. Lighting Co., 240 U.S. 27 (1916) 17

Gant, et al v. Union Bank, 609 F.2d 411, (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980) 17

IBM v. Greyhound Computer, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1980) 17

J. Truett Payne Company, Inc. v. Chrysler Motors Corporation, —— U.S. ——, 101 S.Ct. 1923, 68 L.Ed. 2d 447 (1981) 15, 19

Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961) 15

Lehrman v. Gulf Oil Corporation, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972), 500 F.2d 659 (5th Cir. 1974) 25

Lehrman v. Gulf Oil Corporation, 500 F.2d 659 (5th Cir. 1974) 21

Manning v. Altec, Inc., 48 F.2d 127 (6th Cir. 1973) 18

Perkins v. Standard Oil of California, 395 U.S. 642 (1969) 19

Page

Richfield Oil Corporation v. Karseal Corporation, 271 F.2d 709 (9th Cir. 1959) 21

Ross v. Bernhard, 396 U.S. 531 (1970) 17

Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555 (1931) 24

Taylor v. Washington Terminal Company, 409 F.2d 145 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 835 (1969) 19

Simpson v. Union Oil Co., 396 U.S. 13 (1969) 26

Sinclair Refining Co. v. Gutowski, 195 F.2d 637 (6th Cir. 1952) 26

Volasco Products Co. v. Lloyd A. Fry Roofing Products Co., 346 F.2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965) 19, 21

Westric Battery Co. v. Standard Electric Co., 482 F.2d 1307 (10th Cir. 1973) 24

Zenith Radio Corporation v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 19

STATUTES:

U.S. CONST. Amend. VII 2

Clayton Act, Section 2, 15 U.S.C. §13(a) 3

Clayton Act, Section 4, 15 U.S.C. §15 ..... 2, 3

Judicial Code, 28 U.S.C. §1254(1) 2

Other Authorities:

Rules of the United States Supreme Court

Rule 19.5 2

Rule 23 16

Rule 38, Federal Rules of Civil Procedure 17

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1981

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS,

Cross-Petitioner,

v.

UNIROYAL, INC.,

Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ORDERS BELOW AND JURISDICTION

Cross-Petitioner, J. Wyatt Skaines, seeks review of that portion of the Order of the United States Court of Appeals for the Sixth Circuit filed on December 1, 1981, and Amended Order filed on January 22, 1982, which modified by remittitur a jury's special verdict for loss of future profits from an award of $205,000 to $30,000.00.

Cross-Petitions for rehearing were denied (with some modification of the original order) by the Court of Appeals on January 22, 1982. Neither order has been officially reported; the amended order on rehearing is appended to this cross-petition.

The cross-petition is filed pursuant to Rule 19.5 of this Court's Rules. Uniroyal filed a Petition for Writ of Certiorari on April 21, 1982, and it was received by cross-petitioner's counsel on April 21, 1982. This cross-petition is being filed not more than 30 days thereafter. The Court's jurisdiction to review is sought pursuant to 28 U.S.C. §1254(1).

STATUTES INVOLVED

Seventh Amendment to the United States Constitution, U.S. CONST. Amend. VII, provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Section 4 of the Clayton Act, 15 U.S.C. §15, in part, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

STATEMENT OF THE CASE

A. Nature of the Case and Disposition by the United States Court of Appeals for the Sixth Circuit

Cross-Petitioner, J. Wyatt Skaines, the Plaintiff below in an action for treble damages for violation of the Robinson-Patman Act, 15 U.S.C. §13(a), was awarded a jury verdict and judgment was entered in the United States District Court for the Western District of Tennessee. Skaines, a franchised distributor for Uniroyal, alleged that Uniroyal, Inc. engaged in unlawful practices by discriminating in pricing and payment of consulting fees to a favored competitor, which destroyed competition and his business. The jury returned special verdicts awarding $223,319.00. Pursuant to 15 U.S.C. §15, the District Court trebled the verdict to $669,957.00 and awarded attorney fees to Skaines in the amount of $106,250.00 as part of the costs. Appendix 2, A-7 — A-9.

The United States Court of Appeals for the Sixth Circuit affirmed the jury's verdict as approved by the District Court; however, the Appellate Court remitted the jury's award for loss of future profits from $205,000 to $30,000. This cross-petition seeks to reinstate the jury's special verdict awarding damages for loss of future profits.

B. The Principal Parties

J. Wyatt Skaines resided in Memphis, Tennessee. He worked for Uniroyal for nine years. He was employed by Uniroyal as: a management trainee; a district credit manager for the Memphis territory; a business manager and supervisor for the New Orleans district; a territory sales representative; sales manager in New Orleans and Macon,

Georgia; and, an account manager for Uniroyal's Allied brands division in Texas and Arkansas.

He established and managed a Uniroyal tire dealership in Augusta, Georgia. He also established and managed a wholesale division for a tire dealer in Little Rock, Arkansas, which sold Uniroyal's Allied brand labeled tires. Skaines was engaged in selling or merchandising Uniroyal tire products, either for the company or dealers, for a total of thirteen years.

Uniroyal manufactured and sold tires through two divisions, the Uniroyal division and the Allied brands division. The Uniroyal division sold tires with Uniroyal, Tiger Paw, Laredo, Guardian and Guardian Premium labels. The Allied brands division sold tires with the Peerless, Fisk and Gillette labels. Skaines had been involved with credit and sales of all of Uniroyal's different labeled tires.

C. Memphis Trade Area

In 1968, Shelby Tire Company sold the Uniroyal labeled tires on a retail basis in Memphis. Later in 1968, Thomas Brewer opened Brewer Tire Company and he primarily sold the Uniroyal and Guardian labeled Uniroyal tires. Gillette labeled tires were being sold in Memphis by WECO Tire Distributors, which was owned by Uniroyal. No other Allied brand labels of Uniroyal tires were being sold in the Memphis trade area.

D. Partners for Profit Program

In 1968, Skaines discussed with C. V. Hinton, Uniroyal's regional sales manager for the Allied brands division, the possibility of going into the tire business with Uniroyal in Memphis, Tennessee. Skaines wanted the best priced tire

line that Uniroyal had available. He was advised that the Peerless labeled tires were the most competitively priced label Uniroyal had available.

On June 11, 1968, a projection was prepared by Uniroyal's regional sales manager for Allied brands, the territory sales representative and accounts manager for Allied brands, and the district credit manager for Uniroyal. Skaines projected his expenses, but the other elements of the projection, i.e., projected sales and gross profits, were developed by the Uniroyal representatives. The projection forecasted first year income for the business of $22,456.00. The draftsmen of the projection had combined management experience in excess of 50 years with Uniroyal tire dealerships and they agreed that the amounts forecast on the projection were reasonable.

On June 24, 1968, Skaines and Uniroyal entered into a Peerless Distributor Franchise Agreement. The agreement was part of the "Partners for Profit" program, wherein Uniroyal licensed Skaines as an independent wholesale dealer. Uniroyal had tested this marketing concept with their WECO tire distributors in several markets.

On June 24, 1968, a book balance plan was entered into between Uniroyal and Skaines, wherein Uniroyal extended Skaines credit in the amount of $20,000.00. Skaines pledged to Uniroyal,

> a security interest on all 'company brand tires' manufactured and/or sold by Uniroyal, Inc., including: UNIROYAL, FISK, GILLETTE, GUARDIAN PREMIUM, GUARDIAN PREMIUM NYLON AND PEERLESS OR ANY OTHER BRAND NAME OWNED OR USED BY UNIROYAL, INC. NOW OR IN THE FUTURE.

Skaines was not limited by Uniroyal as to the labels of Uniroyal tires he could buy and sell.

Under the book balance plan, Uniroyal invested in the business through inventory which was put in on deferred terms. The dealer's consideration was to maintain the inventory at the minimum book balance amount and an investment of $10,000 in the business. Uniroyal accepted Skaines for the program because of his excellent business management capacity and knowledge of the tire business, as well as the investment of his life savings.

Skaines' territory included Western Tennessee, Eastern Arkansas and Northwestern Mississippi. The tires Skaines purchased were manufactured by Uniroyal and sold to him in interstate commerce. He placed orders with Uniroyal at its regional office in Atlanta, Georgia.

E. Skaines' Performance and Growth

After starting business in July, 1968, Skaines realized sales from his first quarter of operation in excess of $25,000.00. Sales steadily increased for each of the next three quarters to an amount in excess of $40,000.00. In the third quarter of 1969, the favored competitor started business and Skaines' sales began to decline until he closed his business in March, 1970. Skaines realized a profit from the business within his first four months of operation; however, he encountered inadequate inventory problems with Uniroyal. By April 1969, he again realized profitability in the business for three successive months, but he again had inadequate inventory problems with Uniroyal. The manufacturer admitted it failed to provide Skaines with a proper book balance for inventory, which was finally increased to $30,000.00 in August, 1969.

Uniroyal's failure to provide tires to Skaines caused him to lose sales due to the unavailability of merchandise. In an attempt to meet customer demands, he purchased tires in excess of $30,000.00 from WECO and other Uniroyal dealers since the company would not provide him with an adequate inventory. The three months of largest purchases by Skaines from the Memphis WECO dealership were in August, October and November, 1969, which were three of the first four months of business of the favored competitor, United Tire & Rubber Company.

Respondent's business experienced net profits for six of the twenty months he was in operation, in spite of: Uniroyal's inadequate extension of credit for the first 12 months of business; Uniroyal's failure to furnish inventory; and, head-on competition with Uniroyal's illegally price-favored and commission-subsidized customer. In August and September, 1969, Skaines was able to realize profits, but the profits then were cut off with the entry into the Memphis market of Harold Friend's wholesale Uniroyal tire business, United Tire & Rubber Company ("United").

F. Harold Friend's Agreement With Uniroyal

Unknown to Uniroyal's district and regional management, to Skaines, to Brewer, and to the Memphis WECO management, early in 1969 Uniroyal's executive officers in New York were negotiating with Harold Friend to develop wholesale tire outlets in four cities in the United States. All of Friend's special billing prices were established and his orders placed with Uniroyal's executive officers in New York. In addition to the special pricing afforded to Friend, he was also paid $6,000.00 per month as a consultant for a nine and one-half month period of time, (August, 1969 through March, 1970).

Uniroyal's district and regional management officers admitted they had never known of any other Uniroyal dealer who received special prices and credit arrangements directly from the home office. Likewise, Brewer and Skaines were both unaware, during twenty years of combined employment and association with Uniroyal, of any other Uniroyal dealer who received such pricing or any consulting fees.

G. Uniroyal's Prior Knowledge of The Detrimental Effect of Friend's Operation on Competition With Other Uniroyal Dealers

Uniroyal's top management realized the detrimental impact Friend's "experimental wholesale program" would have on competition when Friend's program was discussed during a New York meeting, when one participant pointed out:

> . . . this type of outlet could interfere with our regular dealers in our retail stores, but Mr. Tully assured him that Friend's wholesale type of outlet would only be used where we had no distribution at the present time and that the prime purpose was to obtain entirely new distribution. (Pl. Ex. 15A5; R. 180, 859).

As of May 20, 1969, Friend planned to open his Uniroyal wholesale operation in El Paso, Texas; Shreveport, Louisiana; Lubbock, Texas; and, Memphis, Tennessee. On June 3, 1969, M. Harvey sent a telegram to Marvin Bruce, president of Uniroyal's replacement sales:

> Upon further review, it is our recommendation that we not move with Harold Friend in the El

> Paso market at this time in view of signing Jim Yearwood early this year. Present indications are that Yearwood should purchase $150,000.00 in the first twelve months. Suggest we hold off with Friend until end of this year and give Yearwood a chance to develop. If he does not work out, then we would suggest we move on Friend program at that time. If you agree, we will inform Yearwood accordingly. (Pl. Ex. 15M, R. 845, 857-858).

Friend opened his Memphis outlet in the name of "United Tire & Rubber Company", ("United"), in August, 1969. He owned and operated the business through his firm, Tire Management Consultants, Inc. of Phoenix, Arizona. Skaines had been in business for one year and he, as well as Uniroyal's regional and district managers, had no prior knowledge of United's entry into the market.

Skaines, WECO, and Friend's United operation were competing in the same consumer market in the Memphis trade area and each was operated in the same manner. Both Skaines and United were located within several city blocks of downtown Memphis.

H. The Like Grade and Quality of Uniroyal's Peerless, Uniroyal, Guardian and Guardian Premium Labeled Tires

Although Skaines was not limited by Uniroyal as to the kinds or labels of Uniroyal tires he could buy and sell, he purchased the Peerless label since it was supposed to be the best priced label. The Peerless labeled tires sold by Uniroyal to Skaines were of like grade and quality to the Uniroyal, Guardian and Guardian Premium labeled tires sold by Uniroyal to United.

Uniroyal's personnel and dealers understood that the tires were the same and that there was absolutely no consumer preference or name-recognition that resulted in any consumer preference between the respective labeled tires. Uniroyal stipulated that the consuming public is not provided any information to develop any preference based on any distinctions as to the grade and quality of the different labeled Uniroyal-manufactured tires. The expert testimony further confirmed that the engineering specifications, grade, quality and performance of the Peerless tires were "virtually identical" to the Uniroyal, Guardian and Guardian Premium labeled tires.

The jury refused to accept Uniroyal's theory that many of the tires sold to United were alleged "blems". Instead, the proof demonstrated that tire manufacturers oftentimes label tires as "blems" when they are merely factory overruns or have some minor cosmetic scuff or discoloration. Each Uniroyal district warehouse also has its own branding iron to place a "blem" imprint on tires sought to be discounted and sold. Insofar as performance, safety and consumer preference were concerned, the blems (sometimes known as Group IV tires), were the same tires as "first quality" tires (sometimes known as Group I tires). Both Skaines and Brewer were denied access to the alleged "blems" and United's records reflected that Group I tires were frequently substituted at "blem" prices.

I. The Anticompetitive Effect of Uniroyal's Price Discrimination Advantages to Friend

In mid-August of 1969, Skaines became aware of United's presence in the market by receiving United's mailers and price sheets from his customers. United's advertised selling prices were below Skaines' carload ship-

ment cost from Uniroyal. The price favortism enjoyed by Friend in comparison to the purchase prices Skaines received from Uniroyal ranged from ten to over fifty percent on each comparable tire of like grade and quality.

During twenty months of business Skaines purchased more than $155,000.00 worth of tires from Uniroyal. Had he received the sales prices Uniroyal gave to Friend, Skaines would have saved $37,761.38 in cost on tires of like grade and quality. By comparing the purchase invoices of Skaines and United during the period when these two businesses were in direct competition, i.e., July 25, 1969, through March, 1970, Skaines' average cost per tire was $6.46 more than United's cost for a tire of like grade, quality and size. Skaines purchased 3,461 comparable tires resulting in price overcharges for this seven month period of $22,293.46.

Uniroyal's price favortism to United and the resulting lower selling prices by United to consumers caused a tremendous drop in Skaines' business. Skaines, Brewer and local Uniroyal management had never seen tire prices as low as United was offering to tire buyers. More than 30 of Skaines' former customers began buying from United. The Plaintiff's lost profits on sales to these customers amounted to $3,476.07. Uniroyal's anticompetitive conduct resulted in Skaines losing his business and losing future profits and income in excess of $561,400.00 based upon Uniroyal's projection for his business. Brewer was also required to close his business.

J. Complaints to Uniroyal About the Price Discrimination Favoring Friend

Thomas M. Brewer, a former seven year employee of Uniroyal became a Uniroyal franchised dealer in Memphis

in the fall of 1968. Skaines had encouraged Brewer to obtain the Uniroyal franchise because he thought Uniroyal had more to offer Brewer than other competitors in the tire business.

Brewer testified that United was selling tires in the Memphis market cheaper than he could buy the tires from Uniroyal's district warehouse. After United flooded the market with brochures, handouts and advertisements, Brewer complained to Uniroyal's district manager and regional manager, that he, Skaines, WECO and others, (including Goodrich and Goodyear), were unable to compete with United's prices. Brewer requested that Uniroyal sell him tires at United's price, but he was advised that such purchase prices were unavailable.

Skaines also complained to Uniroyal's regional management about United's price advantage. Each manager denied any knowledge of United and merely encouraged Skaines to find customers that would pay higher prices for tires. Skaines requested the same buying arrangements, including the right to purchase the alleged "blem" tires that United was also advertising. The Uniroyal representatives denied the existence of any price-favored buying arrangement and also denied that any "blems" were available since Uniroyal had such good quality control. After finally admitting that the competitive problem existed, Uniroyal's district representatives complained to New York management about United flooding the Memphis market with so-called "blems". The complaints continued until February 28, 1970.

Friend was enjoying such favorable prices from Uniroyal that he began selling Uniroyal tires to Mohawk

dealers in Atlanta, Georgia, who were reselling the tires at substantially lower prices than Uniroyal dealers in Atlanta were paying for tires at Uniroyal's Atlanta regional warehouse. Friend's sales of tires outside of the Memphis metropolitan market was considered by Uniroyal as a violation of the agreement with Friend. After discovering Friend's "back-dooring" of the sale of tires in Atlanta, Uniroyal finally terminated its arrangement with Friend on March 25, 1970.

K. Skaines' Attempt to Compete and Uniroyal's Takeover of Skaines' Business and the Market

In an effort to meet United's competition, Skaines reduced prices and attempted to locate customers that did not know about United's prices. In the month of September, 1969, Skaines lowered his prices to meet United's competition. He experienced his largest volume in sales, but he was cutting his sales prices to cost, and he was still unable to meet United's competition. Skaines even tried to make purchases himself from United through Uniroyal distributors, since United's prices were cheaper than his cost from Uniroyal.

In an effort to save his business, Skaines made an informal proposal, to Uniroyal's regional manager, to merge his business with WECO. The proposal was communicated to Dave Harris, the vice-president of Uniroyal's Allied brands division. As late as March 4, 1970, Uniroyal's regional manager was requesting help from Harris to supply Skaines with the alleged "blems" or favorably-priced tires in order to meet United's competition in the market.

Although Skaines never missed a monthly payment to Uniroyal under the terms of the book balance agreement, Uniroyal demanded payment of the entire outstanding book balance of $26,000.00 to be paid on or before March 25, 1970. Because Skaines could not comply and keep his business operational, he assigned all of his accounts receivable and inventory to Uniroyal.

Uniroyal's Memphis WECO operation lost $16,900.00 during 1969 and it was operated at a loss for the entire three year period it had been in business. On April 6, 1970, WECO's manager requested authority from Uniroyal to pursue Skaines' customer accounts. WECO also hired Skaines' employee, who then sold WECO's Gillette labeled tires to Skaines' customers who had formerly purchased the Peerless labeled Uniroyal tires. After terminating Skaines, Brewer and Friend, and hiring Skaines' employee, Uniroyal's business performance at its WECO subsidiary improved. Uniroyal made adjustments, i.e., returns for defects, on Peerless labeled Uniroyal tires purchased by Skaines' customers, by substituting Gillette labeled Uniroyal tires at the Uniroyal Memphis district warehouse and at WECO.

Brewer was forced to close his Uniroyal dealership in June, 1970. In 1974, the United States Court of Appeals for the Sixth Circuit affirmed a District Court jury's finding that Uniroyal's price favoritism conduct to United was in violation of the Robinson-Patman Act and awarded damages to Brewer. *Brewer v. Uniroyal, Inc.*, 498 F.2d 973 (1974).

L. The Dealer's Damages

At trial, Skaines claimed damages as a result of Uniroyal's anticompetitive conduct in favor of United as follows:

a. Loss of profits on sales to customers diverted to United	$ 3,476.00
b. Price discrimination overcharges	22,293.46
c. Consulting fees paid to Friend	57,000.00
d. Loss of profits	336,400.00
TOTAL DAMAGES CLAIMED	$419,169.46

Skaines claimed damages for loss of future profits rather than claiming any damages for the going concern value of the business. At the request of Uniroyal, the jury returned special verdicts, all of which were approved by the District Court as follows:

a. Loss of profits on sales to customers diverted to United	$ 1,150.00
b. Price discrimination overcharges	16,969.00
c. Loss of future profits	205,200.00
TOTAL DAMAGES AWARDED	$223,319.00

The trial court properly instructed the jury that Skaines had the burden of proof to show a violation of the Act as well as proof of "actual damages" being sustained as the direct and proximate result of the alleged antitrust violation. *J. Truett Payne Company, Inc. v. Chrysler Motors Corporation,* —— U.S. ——, 101 S.Ct. 1923, 68 L.Ed. 2d 412 (1981). This standard of proof was previously the rule for the United States Court of Appeals for the Sixth Circuit. *Kidd v. Esso Standard Oil Co.*, 295 F.2d 497 (6th Cir. 1961).

The District Court trebled the jury verdict to $669,957 and the Court also awarded Skaines an attorney fee of $125,000, less a credit of $18,750 (15%) as the estimated amount of duplicated legal services required due to substitution of counsel, for a total fee of $106,250. The United States Court of Appeals for the Sixth Circuit approved the District Court award; but the Appellate Court remitted the special verdict for damages for loss of future profits from $205,200 to $30,000.

This cross-petition seeks a writ of review of the merits or summary disposition reinstating the District Court approved jury award of damages for loss of future profits pursuant to Rule 23 of this Court's Rules.

REASONS TO GRANT THE WRIT

I.

THE SEVENTH AMENDMENT RIGHT TO A JURY TRIAL CANNOT BE INFRINGED UPON BY A FEDERAL APPELLATE COURT RE-EXAMINING AND REMITTING A JURY VERDICT AWARDING LOSS OF FUTURE PROFITS WHEN THERE IS SUFFICIENT EVIDENCE UPON WHICH THE JURY HAD BASED ITS VERDICT.

The Seventh Amendment to the United States Constitution guarantees the right to a jury trial and prohibits the re-examination of facts tried by a jury by any court of the United States. U.S. CONST. Amend. VII. See also Fed. R. Civ. P. 38. This constitutional right extends to antitrust litigation. *Fleitman v. Welsbach St. Lighting Co.*, 240 U.S. 27, 29 (1916) and *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 504 (1950). See also, *Ross v. Bernhard*, 396 U.S. 531, 532-538 (1970) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 471-473 (1962). This right is not to be prejudiced even in complex litigation with complicated facts and difficulty of proof. *IBM v. Greyhound Computer*, 559 F.2d 488 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040 (1980) and *Gant v. Union Bank*, 609 F.2d 411 (9th Cir. 1979), *cert. denied*, 446 U.S. 929 (1980). The practical application of this principle has been stated as,

> Courts are not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable. *Duncan v. Duncan*, 377 F.2d 49, 54 (6th Cir. 1967), *cert. denied sub nom.* (Citations contained therein).

The United States Court of Appeals for the Sixth Circuit recognized in its opinion below that an individual may recover the loss of future profits if he can show that the defendant's alleged antitrust violation was the proximate cause of the damage to the business. Appendix 1, A-3 — A-5. However, the Court reasoned in part,

> In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence.
>
> . . .
>
> Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Appendix 1, A-5 — A-6.

Although the Court did not want to substitute its judgment for that of the jury, the remittitur constituted a complete reweighing of the evidence on the issue of loss of future profits. This action by the Court was completely contrary to its prior decisions which recognized that a jury's award of damages should not be remitted or set aside, where the amount of damages awarded by the jury is clearly within the "maximum limit of a reasonable range". *Brewer v. Uniroyal, Inc.*, 498 F.2d 973, 977-978 (6th Cir. 1974).

> Where the jury finds a particular quantum of damages and the trial judge refuses to disturb his finding on the motion for a new trial, the two factors press in the same direction, and an appellate court should be certain indeed that the award is contrary to all reason before it orders a remittitur or a new trial. *Manning v. Altec, Inc.*, 488 F.2d

127, 133 (6th Cir. 1973), dictum citing: *Taylor v. Washington Terminal Company*, 409 F.2d 145, 148 (C.D. Cir. 1969), *cert. denied*, 396 U.S. 835 (1969).

II.

THE JURY'S SPECIAL VERDICT AWARD FOR DAMAGES FOR LOSS OF FUTURE PROFITS WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND WAS WELL WITHIN THE MAXIMUM RANGE OF REASONABLENESS.

A. The antitrust violations by Uniroyal proximately destroyed competition and Skaines' business.

All damages and losses sustained by an injured party are recoverable under the damage penalty provision of the antitrust laws. 15 U.S.C. §15. *Perkins v. Standard Oil of California*, 395 U.S. 642 (1969); *Volasco Products Co. v. Lloyd A. Fry Roofing Products Co.*, 346 F.2d 661 (6th Cir. 1965), *cert. denied*, 382 U.S. 904 (1965).

Although sheer speculation is not allowed as a standard for assessing damages in an antitrust case, a plaintiff is not required to show mathematical precision. As a result of the antitrust violator's conduct, the amount of damages is not subject to a rigorous degree of proof. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, —— U.S. ——, 101 S.Ct. 1923, 1929, 68 L.Ed. 447 (1981); *Zenith Radio Corporation v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-124 (1960); and *Bigelow v. RKO Pictures*, 327 U.S. 251, 264 (1946).

In compliance with *Payne*, Skaines proved that he sustained actual damages as a direct and proximate result of Uniroyal's price favoritism to United. The Memphis tire

market had never experienced tire prices as low as United offered to customers. As a result, there was a tremendous decline in Skaines' business and more than 30 of his former customers began buying from United after it opened for business. On tires of like grade, quality and size, Skaines claimed that he lost profits from these sales in the amount of $3,476.07. The jury awarded $1,150.00 in damages for this economic loss.

During the period when both businesses were in direct competition with one another, (i.e., July, 1969, through March, 1970), Skaines claimed that he paid Uniroyal $22,293.46 more than United paid for tires of like grade, quality and size. The jury awarded Skaines $16,969.00 for this item of damage.

Skaines lowered his prices to a cost basis; yet, he was still unable to compete against the prices United offered to customers. Skaines lost profits and sales by attempting to meet United's competition. Skaines and Brewer were forced out of business within several months of United's entry into the market.

B. The manufacturer's projection of a dealer's future profits and the dealer's performance are competent evidence and relevant data for a jury's consideration in awarding damages for loss of future profits.

As a result of Uniroyal's illegal conduct, Skaines lost his business and hence, the anticipated future profits. Due to Uniroyal's violative conduct, Skaines' business was destroyed within seven months of United's entry into the Memphis tire market. Skaines, as Cross-Petitioner, claimed

damages for loss of future profits in lieu of claiming damages for the going concern value of the business.

Skaines' claim for damages for loss of future profits was based upon the projection prepared by Uniroyal's territorial sales representative, account manager and district credit manager. Skaines had prepared the projected expense figures and his actual expenses were less than the amounts he had forecast. Uniroyal's participants who prepared the projection and Skaines had more than fifty years combined experience with Uniroyal and Uniroyal tire dealerships. They all agreed that the amounts reflected on the projection were fair and reasonable.

The projection was relied upon as the basis for Skaines' selection of Uniroyal and his investment in the tire business. The annual income projected for the business was $22,456.00. The projection was prepared by Uniroyal's representative utilizing their experience in the business, and it reflected comparable experience of others in the tire business. The projection was relevant data for reference by the trier of fact.

The comparable experience of others in a field has been recognized as an acceptable reference for proof of damages in an antitrust case. *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Lehrman v. Gulf Oil Corporation*, 500 F.2d 659 (5th Cir. 1974) (dictum); *Richfield Oil Corporation v. Karseal Corporation*, 271 F.2d 709 (9th Cir. 1959). A mathematical projection based on the prior business of a plaintiff is a reasonable method of calculation of damages even though it cannot be shown with mathematical precision. *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, supra.

If a projection is available and based on extensive experience of sales and profits, then it should be available as credible evidence. If the figures are good enough for reliance by a party to invest his money and his career, it would seem that such a projection should be a reasonable source of consideration for the trier of fact.

C. The Appellate Court's remittitur was based upon a misunderstanding of uncontroverted facts which reflected the Dealer's business performance as additional relevant data for the jury's consideration of loss of future profits.

The Sixth Circuit Court of Appeals erroneously summarized the Cross-Petitioner's evidence on the claim for loss of future profits as,

> The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Appendix 1, A-4 — A-6.

The Court of Appeals erroneously concluded that Skaines, ". . . contended that the business realized sales greater than $25,000 for the first year of business . . ." Appendix 1, A-5 — A-6. In fact, the sales for his first year of business were in excess of $127,500.00 (Pl. Ex. 128; R. 224). He commenced business in July, 1968, and he realized sales

in excess of $25,000 in the first quarter of business. Sales were in excess of $30,000 for the second quarter, $32,500 for the third quarter and $40,000 for the fourth quarter of his first year of operation.

Whenever Skaines was not hampered by Uniroyal's failure to provide inventory or adequate book balance, his business grew in its profitability and realized a normal profit growth. Such was the case until United entered the Memphis market. From Skaines' experience in credit, sales management and marketing with Uniroyal and its tire dealers, the profitability of his business had been unusual since profits had been so quickly realized. Skaines' quarterly sales increased steadily and corresponded with Skaines' experience with other successful new Uniroyal dealers. Uniroyal introduced no contradictory evidence. However, the dealership suddenly began to experience a reversal of its sales and growth trend in the third and fourth quarters of 1969 and the first quarter of 1970, when Skaines was finally required to close his doors.

Uniroyal projected $22,456 in annual income for the first year, which included a $9,000.00 owner withdrawal. The trial Court required the owner withdrawals to be deducted as representing annual salary or expected cost of management. Uniroyal admitted that due to Uniroyal's failure to provide Skaines with an adequate extension of credit and due to Uniroyal's failure to provide him with adequate inventory, Skaines did not enjoy the success in his first year of business that he should have enjoyed. Despite Uniroyal's failure to provide Skaines with an adequate extension of credit, their failure to furnish adequate inventory, and the unfair competition with United, Skaines generated net profits from the business

for six of the twenty months that he was in operation. These facts are contrary to the appellate court's order which states that the "evidence only showed that the Plaintiff lost money during the entire time of his venture." Appendix 1, A-4 — A-5.

When profits can be extrapolated from the prior experience of a business, they are recoverable even if prior experience reveals only net losses. *Westric Battery Co. v. Standard Elec. Co.*, 482 F.2d 1307 (10th Cir. 1973). An antitrust plaintiff may prove his damages by reasonable estimate and juries are allowed to act upon profitable and inferential evidence, as well as, direct and positive proof. *Bigelow v. RKO Radio Pictures, Inc., supra*, 262-266. As observed by this Court,

> The wrongdoer may not object to the Plaintiff's reasonable estimate of the cause of injury and of its amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable. *Bigelow, supra* at 265.

Even if there is some uncertainty in the mode of estimating damages, if the uncertainty is caused by the defendant's own wrongful acts, then justice and sound public policy alike require that the wrongdoer bear the risk of the uncertainty thus produced. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 565 (1931). As observed by the District Court, part of Skaines' difficulty in proving his case was "due to Defendant's [Uniroyal's] inability to furnish adequate records." Appendix 3, A-15 — A-16.

D. The estimation of the duration of the expected profitability of a business is an issue of fact.

The Appellate Court was also apparently concerned with the fact that the jury would have to "speculate" on the length of time that the Cross-Petitioner would have had a thriving business. Appendix 1, A-4—A-5. No evidence was tendered to establish any prospective termination of the dealership arrangement with Skaines. Instead, the record is without contradiction that Skaines intended to continue in business for 25 years until he attained the age of 65.

The duration of the period in which a party might be expected to profit is not susceptible of precise formulation; rather it is a jury question and the youth of a business alone will never justify severe restrictions upon the duration of damages. *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir. 1972), *cert. denied*, 409 U.S. 1077 (1972).

As the *Bigelow* rationale was considered by Mr. Justice Black,

> . . . when as here a young man's business is wiped out, root and branch, by a wrongdoer, the measurement of the victim's damages is not so simple a matter. This is true because no one can infallibly predict how long that business would have continued to grow and flourish or precisely how much the business would have been worth to him in 25 years. But certainly a fair and just legal system is not required by difficulties of proof to throw up its hands in despair and leave the sufferer's damage to be borne by him while the person who did the wrong goes scot free. This Court has refused under such circumstances to hold that our system

> of justice is so helpless to do justice. In this very antitrust field, our Court has specifically and pointedly refused to permit antitrust violators to escape liability for the wrongs on the argument that damages must not be awarded because they are uncertain and speculative. *Simpson v. Union Oil Co. of California*, 396 U.S. 13, 16 (1960) (Black, J., Concurring and Dissenting).

Skaines sought damages for loss of future profits in an amount of $336,400, which represented annual earnings from the business of $13,456 for 25 years until he attained the age of 65. Although Uniroyal's projection forecasted annual income for the first year of $22,456, owner withdrawals of $9,000 per year were not included in Respondent's calculation of his loss of future profits. The $336,400 amount claimed did not include any amount for growth and development. The jury awarded $205,200 for this item of damage, which represents approximately 11 years of the annual amount of anticipated earnings ($13,456) at a compound interest rate of six percent (6%). Since this case came to trial more than nine years from the date of the demise of Skaines' tire business, the award by the jury is well within the maximum range of reasonableness. *Brewer v. Uniroyal, Inc., supra* at 977-978. If there is some evidence of a reasonably anticipated profit, then the appellate court should not set aside or disturb such a verdict that has been sustained by the trial court. *Sinclair Refining Co. v. Gutowski*, 195 F.2d 637, 641 (6th Cir. 1952).

Uniroyal's projection, the growth of Skaines' business and his experience in the tire business provided the jury with reasonable data and evidence to properly consider and award damages for loss of future profits. The jury's verdict

for $205,200 for this item of damages was well within a range of reasonableness and it was a fact issue which should not have been re-examined by the Court of Appeals in violation of the parties' right to a jury trial as secured by the Seventh Amendment to the United States Constitution. U.S. CONST. Amend. VII.

CONCLUSION

For the reasons stated, the question presented merits review by this Court by grant of a writ or by summary disposition reinstating the total amount of the jury's special verdict for loss of future profits.

Respectfully submitted,

BRUCE D. BROOKE
Memphis, Tennessee

Attorney for Cross-Petitioner

OF COUNSEL:

NEELY, GREEN & FARGARSON
60 North Mid-America Mall
12th Floor
Memphis, TN 38103
(901) 523-2500

APPENDIX "1"

NO. 80-1329

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

J. WYATT SKAINES, individually and d/b/a WYATT TIRE DISTRIBUTORS ..... *Plaintiff-Appellee*

v.

UNIROYAL, INC., formerly UNITED STATES RUBBER COMPANY ..... *Defendant-Appellant*

AMENDED ORDER

(Filed January 22, 1982) John Hehman, Clerk

BEFORE: EDWARDS and MARTIN, *Circuit Judges and* FEIKENS, *District Judge**

Uniroyal, Inc. ("Uniroyal"), defendant below, appeals from a jury verdict of $223,319 for price discrimination in violation of §2(a) of the Robinson-Patman Act, 15 U.S.C. §13(a). This verdict was trebled pursuant to §4 of the Clayton Act, 15 U.S.C. §15, and with the award of attorneys' fees in the amount of $106,250, the total recovery of Skaines, plaintiff below, was equal to $776,207; judgment was entered thereon by the United States District Court for the Western District of Tennessee.

On June 24, 1968, Skaines entered into a "Peerless Distributor Franchise Agreement" with Uniroyal concomi-

---

*The Honorable John Feikens, Chief Judge, United States District Court for the Eastern District of Michigan, sitting by designation.

tantly with a book balance plan.* Prior to entering the agreement with Uniroyal, Skaines drew up a worksheet with three sales representatives of the tire company to project expenses and profits for the business for the year between July 1, 1968 and June 30, 1969. The "Financial and Operating Budget" anticipated a total annual income before taxes for the first year of $22,456.

The venture did not succeed and this lawsuit ensued in which Skaines claimed price discrimination by Uniroyal as a cause. He claimed tires were being sold by Uniroyal to him at a higher price than to United Tire & Rubber Company ("United"), another tire distributor in Memphis. Upon trial the jury concluded that the tires that were supplied to United were of like grade and quality as those supplied to Skaines, albeit they were sold in some instances under different labels, and found price discrimination. A verdict was returned for Skaines.

Uniroyal moved for judgment notwithstanding the verdict, or in the alternative for a new trial. The standards for review of the motions are similar but not identical. To determine if a judgment notwithstanding the verdict is proper, the evidence must be viewed in the light most favorable to the party that secured the jury verdict and reasonable minds must not differ as to the conclusions to be drawn from the evidence. *Woodruff v. Tomlin*, 616 F.2d 924, 934 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Gilham v. Admiral Corp.*, 523 F.2d 102, 109 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976). In this case, there was sufficient question as to whether the tires were of like grade and quality to require a determination by a trier of fact. The

*Under this plan, Skaines was required to contribute $10,000 to the venture and Uniroyal supplied a $20,000 tire inventory.

decision of the District Court denying Appellant's motion for judgment notwithstanding the verdict is affirmed.

On appeal, the reviewing court must only reverse the District Court's denial of a new trial if it appears that that court abused its discretion. *Duncan v. Duncan*, 377 F.2d 49 (6th Cir. 1967). In this instance, the District Court concluded that there was overwhelming evidence from which a jury could conclude that there had been a violation of the Robinson-Patman Act, even though it was of very short duration. Since the District Court had the benefit of hearing testimony that was presented in this case, as did the jury, we are not inclined to overturn its ruling that the verdict was not against the great weight of the evidence. Nor do we find error in the jury instructions pertaining to the element of "like kind and quality." The decision of the District Court denying Appellant's motions for a new trial on these issues is affirmed.

Having found liability for a violation under §2(a) of the Robinson-Patman Act, we turn to the question of damages. The jury awarded Skaines, in special verdicts, $1,150 for diverted sales, $16,969 in price differentials, and $205,200 in lost future profits. Appellant contends that the recent United States Supreme Court decision, *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 49 U.S.L.W. 4516 (May 18, 1981), limits a plaintiff's recovery to actual damages. We do not agree. The *Payne* decision states that damages are not presumed to result from a Robinson-Patman violation and, thus, "automatic" damages are not recoverable. It further holds that damage to a business is not, in and of itself, proof of a violation of §2(a) of the Robinson-Patman Act. We interpret *Payne* to mean that

proof of injury must be submitted from which, under proper instructions, a jury may find damage. Such an award may perhaps not be in the actual dollar amount of damage suffered, but because it is based on proof of injury and has been specifically found to be damage by the jury, cannot be characterized as automatic. A jury verdict so based is consonant with *Payne*. In so holding, the court in *Payne* relied on cases in which future profits were awarded as the result of Sherman Act violations and looked to the evidence presented by Payne in support of his claim of future profits.

The concept of recovery for lost profits is not without precedent. The statute that provides for recovery of treble damages does not distinguish between Sherman Act violations and Robinson-Patman Act violations. 15 U.S.C. §15, Clayton Act §4. An individual who is forced to close his business may recover lost future profits if he can show that the defendant's antitrust violation was the reason that the business was damaged. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 862 n.28 (5th Cir. 1981); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 45-47 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); *Farmington Dowell Products Co. v. Forster Mfg. Co.*, 421 F.2d 61, 81 (1st Cir. 1970). However, while the amount of damages is not subject to a rigorous degree of proof, *Payne, supra*, at 4519; *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123-24 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946); *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561-66 (1931), a plaintiff cannot be awarded damages that are purely conjectural and speculative. *Bigelow, supra*, at 264; *Lehrman, supra*, at 46. The problem that we face in this

case is similar to that faced by the courts in *Farmington Dowel, supra,* at 81, *Lehrman, supra,* at 45, and *Hanson v. Pittsburg Plate Glass Industries, Inc.,* 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied,* 414 U.S. 1136 (1974). In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages. This finding means that the Appellee is awarded in specific damage for diverted sales $1,150; in specific damage for price differentials $16,969; and in specific damage for lost future profits $30,000 — all totalling $48,119. When the damages are trebled, Skaines will be entitled to receive $144,357 in damages and $106,250 attorneys' fees.

Accordingly, the decision of the District Court is affirmed in part and reversed and remanded in part for actions consistent with the decision of this court on damages.

ENTERED BY ORDER OF THE COURT.

/s/ John A. Hehman, Clerk

APPENDIX "2"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

ORDER AWARDING ATTORNEYS' FEES, STATUTORY DAMAGES, AND JUDGMENT ON THE VERDICT

(Filed February 22, 1980)

Having overruled defendant's post-trial motion, the Court concludes that the total damages awarded by jury in the amount of $223,319 should be trebled in accordance with 15 U.S.C. 15 so that the plaintiff shall have a judgment against the defendant in the amount of $669,957.

In support of the application for attorneys' fees, the present attorney for the plaintiff, Bruce D. Brooke, has filed affidavits from five attorneys who have worked on the case, including himself, which reflect a total number of 971.1 hours devoted to the case. It should be noted that this does not include the time devoted to responding to the defendant's post-trial motions. Three of these affidavits also state the reasonable amount of the total fee to be $110,000, $110,000, and $150,000. There are also four additional affidavits from members of the Memphis and Shelby County Tennessee Bar who have found reasonable value

of the total services rendered to be $135,000, $125,000, $120,000, and $116,000 respectively. These are based upon in excess of 925 hours.

This Court is of the opinion that a reasonable fee for services covered by the affidavits is $125,000. This takes into account the fact that the time of two associates, Stambaugh and Minor, would not command as large a fee.

However, the time spent in this case includes substantial duplication due to a change of lead attorneys approximately 11 months before trial. This case was primarily handled after it was filed by Phillip Brooke. His affidavit reflects that he has devoted 444.1 hours to this case. In mid-1978, due to his health, he requested that he be relieved from further representation. Thereafter his brother Bruce D. Brooke became the primary attorney for the plaintiff. He devoted 340 hours to the case exclusive of the response to the post-trial motion of the defendant. Undoubtedly Bruce Brooke had to duplicate some of the services which his brother had performed. The Court of Appeals for the Sixth Circuit has approved the arbitrary method of deducting for duplication by applying a percentage to the total.* In this case the percentage factor should be 15%, which amounts to $10,750, thereby resulting in a total fee to be awarded of $106,250.

While the costs are allowable against the defendant, no bill of costs nor schedule of expenses has been filed. Therefore, the Court cannot rule upon that at this time.

---

*Northcross v. Board of Education, Memphis City Schools, ____ F.2d ____ (C.A. 6th, 11-23-79).

In summary, it is hereby ORDERED that the Clerk will enter a judgment for the plaintiff in the amount of $669,957 and an award of attorneys' fees as part of the costs in the amount of $106,250.

ENTER: This 21st day of February 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court

APPENDIX "3"

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

J. WYATT SKAINES, d/b/a
WYATT TIRE DISTRIBUTORS ..... *Plaintiff*

vs. No. C-72-216

UNIROYAL, INC., formerly
UNITED STATES RUBBER CO. ..... *Defendant*

RULING ON DEFENDANT'S MOTION FOR JUDGMENT N.O.V. OR A NEW TRIAL OR REMITTITUR

(Filed February 22, 1980)

This ruling pertains to the post-trial motions in this antitrust case brought pursuant to the Robinson-Patman Act wherein the jury rendered verdicts in favor of the plaintiff in the total amount of $223,319. Plaintiff seeks to have that sum trebled, and the defendant by its post-trial motion seeks to have a judgment notwithstanding the verdict, a new trial, or a remittitur.

Grounds I, II, and III attack the amount and weight of the evidence, with Ground III being based upon a charge of a verdict so excessive as to indicate prejudice on behalf of the jury. This Court concludes there is evidence to support the jury's findings. In fact the jury's verdict was substantially less than the amount contended for by the plaintiff.

Ground IV of defendant's motion is based upon a contention that the Court erred in not granting a mistrial

because the plaintiff "radically changed" his characterization of his alleged damages and the amount and basis of calculating the same. This contention by the defendant is completely contrary to the record in this cause. The defendant could have been aware of the plaintiff's proposed method of calculating damages as early as December 1, 1978. The defendant obtained a continuance of this matter in January 1979, allegedly for the purpose of carrying out discovery of the plaintiff's theories of damages. The defendant took no steps to determine the method of the plaintiff's calculation. Plaintiff's calculation was based upon the figures generated from the defendant's own records that reflected a substantial difference in prices given to the favored United Tire Company as against the prices extended to the plaintiff. The objection which the defendant raised at the time of the trial of the cause was that it would not have an opportunity to cross-examine the plaintiff about this calculation. In response to the defendant's request, the Court was willing to reopen the proof. The defendant further had its methods and systems analyst, Jack Hance, continuously available for assistance to attempt to develop any alleged rebuttal proof.

The defendant further claims as error Number V on the part of the Court, allowing the plaintiff to reopen his proof regarding price differentials. The Court's direction to the plaintiff to reopen the proof was as a result of the defendant's claim that the trier of fact would not be able to properly discern the evidence that had already been introduced. In the Court's discretionary authority to obtain justice and fairness in the trial, it directed that the plaintiff reopen its proof to cut down on the amount of the claim for price discrimination to the period wherein the alleged favored customer was in competition with the plaintiff.

Grounds VI through X allege errors of omission and commission on the part of the Court in the matter of the Court's instructions to the jury with regard to the troublesome principle of like grade and quality. At the trial and prior to the jury instructions considerable discussion and argument was devoted to the topic of like grade and quality. In addition to the problems common to most products, the automobile tire industry has its own pecularities such as the industry practice of selling "blemished" tires for reduced prices and the practice by the manufacturer of designating some regular tires as blemished in order to sell them quicker or to give a particular customer a favored position.

There was an additional problem peculiar to the proof in this case concerning truck tires. In some measure due to the defendant's tardiness in furnishing information, plaintiff's expert was not able to make some pretrial comparisons for the matter of truck tires. However, in the opinion of this Court, that went to the weight of the expert's testimony.

This Court is of the opinion that it instructed the jury in accordance with the applicable law in the light of the issues presented by the proofs offered.

Grounds XI, XII, and XIII allege errors of the Court with regard to the Court's rulings and jury instructions in the matter of how the amount originally claimed by plaintiff as compensation for his services was eliminated from the claimed amount of future lost profits and the corollary item of plaintiff's earnings in another field after his tire business was closed.

This Court required the plaintiff to remove from his claimed annual lost profits the sum of $9,000 which had

been inserted in projections prepared or approved by defendant personnel as appropriate compensation for the services to be rendered by the plaintiff to the tire dealership. This reduced the claimed net profit and hence the projected loss of future profits. This was the Court's attempt to have the jury determine the lost profits exclusive of the value of plaintiff's personal efforts because he had moved into another means of earning a living.

As Ground XIV, defendant contends that the Court erred in failing to instruct the jury that any verdict it might award would be trebled. The defendant argued this very same position during the time of trial and the Court ruled that there is no affirmative responsibility to mention trebling to the jury.

Ground XV charges that the Court erred as a matter of law because it allowed the jury to speculate as to the amount of plaintiff's damages in all the categories submitted to them: (1) lost profits on sales diverted from plaintiff; (2) differentials in prices the defendant charged United Tire and Rubber Co. versus the prices charged plaintiff; (3) plaintiff's lost future profits. This contention of the defendant is the same as there being a lack of evidence to support any verdict which awards damages.

(1) The jury found, pursuant to the interrogatory submitted, that the loss of profits on sales to customers during the period covered by the lawsuit were, in fact, proximately caused by the illegal price discrimination of the defendant. The plaintiff offered testimony that his basis for a high sales volume in September 1969 was the result of his willingness to lower his prices in order to compete with the prices extended by the defendant to its favored customer, United Tire Company. The jury's award

for this item was substantially below the proof relied upon by the plaintiff for this category of damages.

(2) In support of its attack on the damages based upon price differentials between the prices charged plaintiff and United Tire, the defendant has filed an affidavit of a paralegal, Victoria S. Baird, that purports to show that some of plaintiff's proof in this regard was inaccurate. This attack pertains to the proof that was offered when plaintiff was allowed to reopen the proof in order to present proof of a lesser amount of damages in the light of the Court's ruling on some of the proof.

Upon reopening of the proof, plaintiff testified that between July 25 and October 1969 he purchased 2,579 tires for $41,527.15, an average of $16.10 per tire; that United Tire and Rubber Co. purchased 5,645 tires for $53,751, an average of $9.52 per tire; and that plaintiff was claiming as damages the difference between the aforementioned average prices, $6.58 per tire, times 2,579 tires, or a total of $16,969. The jury awarded this amount as price differential damages.

In some respects the argument made from Mrs. Baird's affidavit is inaccurate and irrelevant. Otherwise, the inferences presently asserted are arguments which should have been presented to the jury.

(3) This attack is open upon the $205,000 portion of the verdict, which the jury found to be based upon loss of future profits. The attorney for the defendant argues that this award is speculative and excessive in that it is based upon a business that closed after 21 months, during which period there was never an annual profit. While this Court agrees that this is a substantial verdict, the Court believes

that the antitrust law provides that the loss of future profits is an allowable element of damages.

Initially, the plaintiff claimed $561,400 in damages for loss of his profits from the expected operation of the business for 25 years. This was based upon a projection of estimated expenses, sales, and profits prepared by knowledgeable officials of the defendant company and the plaintiff who had ten years of employment with defendant and other tire companies. This projection was made prior to the commencement of the operation of the violated dealership. The projection included $9,000 per year for the plaintiff, who was projected to be the owner-manager. Because the plaintiff has established himself in another type occupation the Court ruled that $9,000 per year should be removed from this part of plaintiff's damage claim. After that claim was removed, the plaintiff's remaining total claim for loss of future profits was $336,000. Therefore the $205,000 represents a further downward adjustment of the claim by the jury, which could have been based upon a number of different items such as some of the plaintiff's actual financial data, including profits for some months, or the value of money received now for loss of profits in the future.

This Court finds no basis for setting aside nor reducing this verdict.

Grounds XVI, XVII, XVIII, and XIX are also based upon claimed errors in the portion of the judgment based upon the damages awarded by the jury for the loss of future profits. These are, respectively, claims by the defendant of no showing of actual damages, the verdict is duplicative with damages for losses on diverted sales, the verdict was upon mathematically erroneous calculations and the

jury awarded too much money for the loss of future profits for a business that operated this short length of time and that had as little capital as the plaintiff's tire business had. As the Court heretofore indicated, the antitrust law recognizes loss of future profits as an element of damages. In this case there was exceptionally strong evidence of a violation of the Robinson-Patman Act, albeit of short duration. The case was a difficult one for the plaintiff to prove, due to defendant's inability to furnish adequate records. This Court believes that the matter was submitted to the jury in accordance with the law in the light of the evidence offered.

IT IS THEREFORE ORDERED that the motion of the defendant for a judgment notwithstanding the verdict or a new trial or a remittitur is hereby overruled.

ENTER: This 21st day of February 1980.

/s/ Robert M. McRae, Jr., Judge
United States District Court

[redacted]

IN THE

[redacted]

October Term, 2021

J. WYATT SHAINER, d/b/a
WYATT TIRE DISTRIBUTORS,

Cross-Petitioner,

v.

UNIROYAL, INC.,

Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

[redacted] P. Howell
New York City

and

[redacted] F. Jamieson
Memphis

Attorneys for Respondent

Of Counsel:

Gregory M. Gunn
Andrews, Davis & Kalmus P.C.
1250 Avenue of the Americas
New York, New York 10020
(212) 661-6000

and

Robert P. Wynne
Assistant Assist District Counselor
McGlaun & Pennywit
1000 Ole Commerce Square
Memphis, Tennessee 38103
(901) [redacted]

TABLE OF CONTENTS

	PAGE
Order Below	1
Counterstatement of the Case	2
Reasons to Deny the Cross-Petition	6
I—Remittitur of an Excessive Jury Verdict Does Not Infringe the Seventh Amendment to the Constitution	7
II—The Appellate Panel Correctly Found Such "Paucity of the Evidence" as to Dictate Its Remittitur	8
Conclusion	11

TABLE OF AUTHORITIES

PAGE

Cases:

Albrecht v. Herald Company, 452 F.2d 124 (8th Cir. 1971) 10

Associated Press v. Taft-Ingalls Corp., 340 F.2d 753 (6th Cir. 1965) 9

Baush Machine Tool Co. v. Aluminum Co. of America, 79 F.2d 217 (2d Cir. 1935) 10

Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946) 8

Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338 (3rd Cir. 1975) 9

Dimick v. Schiedt, 293 U.S. 474 (1935) 7

Elder-Beerman Stores Corp. v. Federated Department Stores, Inc., 459 F.2d 138 (6th Cir. 1972) 9

Flame Coal Co. v. United Mine Workers of America, 303 F.2d 39 (6th Cir. 1962), *cert. den.*, 371 U.S. 891 7

J. Truett Payne Co., Inc. v. Chrysler Motors Corporation, 451 U.S. 557 (1981) ..... *passim*

Parrish v. Cox, 586 F.2d 9 (6th Cir. 1978) 2

R.E.B. Inc. v. Ralston Purina Co., 525 F.2d 749 (10th Cir. 1975) 6

Security Tire & Rubber Co. v. Gates Rubber Co., 598 F.2d 962 (5th Cir. 1979), *cert. den.*, 444 U.S. 942 (1979) 2

PAGE

Simpson v. Union Oil Company of California, 411 F.2d 897 (9th Cir. 1969), *rev'd on other grounds*, 377 U.S. 13 (1969) 10

Volasco Products Company v. Lloyd A. Fry Roofing Company, 346 F.2d 661 (6th Cir. 1965), *cert. den.*, 382 U.S. 904 (1965) 9

Webb v. Utah Tour Brokers Ass'n, 568 F.2d 670 (10th Cir. 1977) 9

Wicks v. Henken, 378 F.2d 395 (2d Cir. 1976) 7

Statute:

28 U.S.C. §2106 7

Other Authorities:

59 C.J.S., Juries, §128e, pp. 855-6 7

Wright & Miller, 11 Federal Practice and Procedure, § 2820, pp. 128-131 7

6A Moore's Federal Practice ¶59.05[3], p. 59-49 7

No. 81-2158

IN THE

Supreme Court of the United States

October Term, 1981

J. WYATT SKAINES, d/b/a WYATT TIRE DISTRIBUTORS,
Cross-Petitioner,

v.

UNIROYAL, INC.,
Respondent.

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

Order Below

Respondent, Uniroyal, Inc., seeks denial of certiorari to cross-petitioner (plaintiff below) J. Wyatt Skaines, d/b/a Wyatt Tire Distributors, for review of the Amended Order of the United States Court of Appeals for the Sixth Circuit filed January 22, 1982, in this price discrimination case which reduced and remitted the special jury verdict for loss of future profits from $205,200 to $30,000 subject to the option of cross-petitioner for a new trial as to damages.*

* Uniroyal's original petition in this case, No. 81-1949, also addressed, *inter alia*, the question of lost future profits as a measure of damage in Robinson-Patman cases. That petition was denied by this Court by Order entered June 14, 1982.

Counterstatement of the Case

Petitioner seeks to reinstate the jury's special verdict for loss of future profits based on a profit projection for Skaines' first year of business and his prospective 25-year business life. In that first year, however, and unencumbered by any "favored" competitor, Skaines realized a loss rather than the profit predicted in the projection.

For the most part, petitioner's statement of the case is not germane to the single issue presented in his cross-petition but reflects continuing arguments as to liability issues which were resolved in a state court action in Uniroyal's favor. Thus, as a result of rulings of the state court, Skaines was precluded from rearguing allegations relating to breach of contract and failure to supply adequate merchandise or to extend credit. The case below was tried solely on Robinson-Patman issues of liability and damage.

Nor does Section L of petitioner's "Statement" (p. 15) set forth accurately the damages claimed at trial. In fact, damages were alternatively computed (and charged by the court) for a two month or a seven month period of time depending upon the jury's determination as to when the favored customer, United Tire, became a wholly owned subsidiary of Uniroyal thereby terminating any question of Robinson-Patman violation. *Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962 (5th Cir. 1979), *cert. den.*, 444 U.S. 942 (1979); cf. *Parrish* v. *Cox*, 586 F.2d 9 (6th Cir. 1978).

Insofar as now relevant, Skaines' claimed damages were:

	2 months	*7 months*
(a) loss of profit on sales to customers diverted to United	$ ——	$ 3,476.00
(b) price differentials	$ 16,969.00	$ 22,293.46
(c) loss of future profits	$336,400.00	$336,400.00

Without dwelling on the court's charge to the jury as it related to recovery of price differentials and future profits, the jury returned the following special verdicts:

(a) loss of profit on sales to customers diverted to United	$ 1,150.00
(b) price differentials	$ 16,969.00
(c) loss of future profits	$205,200.00

The District Court trebled the aggregate of these verdicts and, without hearing Uniroyal, awarded and added attorneys' fees of $106,250.

The Court of Appeals approved the handling by the District Court of the principal liability issue of whether there had been discriminatory pricing of goods (tires) of "like grade and quality" and the special verdict of $16,969 in price differentials despite (a) the special—and duplicative—verdict for the "actual" loss sustained through diverted sales and (b) this Court's recent admonishment against "automatic" damages in *J. Truett Payne Co., Inc.* v. *Chrysler Motors Corporation*, 451 U.S. 557 (1981). However, the third special verdict for loss of future profits was reduced and remitted from $205,200 to $30,000 subject to

Skaines' right to a new trial as to damages if he did not accept the remittitur. (The Court of Appeals did not address but accepted without comment the $106,250 counsel fee awarded by the District Court despite its drastic reduction of the aggregate single damages from $223,319 to $48,119.)

In ordering the remittitur which petitioner would have this Court review, the Court of Appeals stated in part:

> The problem that we face in this case is similar to that faced by the Courts in . . . [citations] . . . In all instances, the jury was asked to speculate on the length of time that a plaintiff would have had a thriving business in the absence of the antitrust violation when the evidence only showed that the plaintiff lost money during the entire time of his venture. In the case before us, we are of the opinion that the amount of the jury award is not sufficiently supported by the evidence. The only data presented by Skaines in support of his claim for future profits is that contained in the Financial and Operating Budget for the year 1968-69 and his statement that he expected to stay in business until he retired 25 years later at the age of 65. The fact that Skaines contended that the business realized sales greater than $25,000 for the first year [*sic*] of business in the face of income tax returns that showed a net loss for the two fiscal years that he was in business does not help his position. Although we do not substitute our judgment for that of the jury, the paucity of the evidence to support such a large verdict is apparent. For these reasons, we remand to the District Court for entry of an order of remittitur. Unless Appellee agrees to remit $525,600 within thirty days of the entry of the order, the District Court should grant a new trial limited to the issue of damages.

The Court of Appeals thus correctly summarized the record and the cross-petition does not really take issue with these findings.* In addition to the panel's observation, it is undisputed that Skaines had not tested his entrepreneural skills in the marketplace prior to beginning his tire business and actually—against a budgeted profit—sustained a loss during his first year of operation, a point in time when there was no favored customer. Moreover, the budget itself contained a specific disclaimer as to the accuracy of its projections.

That the jury concluded that the period of unfair competition lasted from mid-August of 1969 when United Tire began business to mid-October of 1969 when Uniroyal acquired United Tire and its employees became Uniroyal employees is clear from its verdict of $16,969 for price differentials, precisely the figure Skaines calculated for those eight weeks. During this time frame, Uniroyal granted Skaines an additional $10,000 inventory credit and Skaines sustained his best ever sales in September. The jury award of $205,200 in lost future profits for two months of price discrimination totalling $16,969 and causing only $1,150 of actual lost profits is grossly—and reversibly—excessive.

---

* That the panel below may have inadvertently said "first year" instead of "first quarter" (Pet. p. 22) comes to no more than quibbling.

Reasons to Deny the Cross-Petition

With the denial of Uniroyal's petition, No. 1949, there is no added reason to grant the present cross-petition, although it remains that lost future profits have not served as a damage model in any reported Robinson-Patman case to date.

In *Payne, supra,* this Court emphatically rejected the award of "automatic" damages measured simply by totalling the aggregate dollar amount of provable price differentials in favor of proof of "actual" damage through lost sales or reduced prices. It is, therefore, at least arguable, we submit (and did in No. 1949), that hypothetical (or theoretical) damages for lost *future* profits *after* all Robinson-Patman violations have ceased fall beyond the *Payne* mandate that only *actual* damage is to be assessed.

Be that as it may, the Sixth Circuit allowed both "actual" and "automatic" verdicts to stand* and, through remittitur, in effect suggested petitioner accept either $30,000 in lieu of the excessive lost future profit verdict of $205,200 or a new damage trial. (Petitioner, by accepting the remittitur, may still gain, through trebling, seven years of future profit as measured by the $13,000-plus profit projected—but not attained—for his first year's operation.)

This Court, as noted, has already declined to review the overall disposition below. In any event, the reasons now advanced by the cross-petition for review of the remission of the lost future profit award lack substance.

---

* Duplicate recoveries are, in and of themselves, cause for remittitur, *R.E.B. Inc.* v. *Ralston Purina Co.,* 525 F.2d 749 (10th Cir. 1975).

I

Remittitur of an Excessive Jury Verdict Does Not Infringe the Seventh Amendment to the Constitution.

Cross-petitioner's assertion in this regard is all but frivolous, at least in this day and age. See, *e.g.*, dicta in *Dimick* v. *Schiedt*, 293 U.S. 474, 482-3 (1935). The panel below in ordering remittitur was well within Sixth Circuit precedent. See, *e.g.*, *Flame Coal Co.* v. *United Mine Workers of America*, 303 F.2d 39, 47 (6th Cir. 1962), *cert. den.*, 371 U.S. 891, and note cases collected in *Wicks* v. *Henken*, 378 F.2d 395 (2d Cir. 1967). Indeed, remittitur, with the option of a new *jury* trial, must now be seen as simply a discretionary alternative afforded by appellate courts, federal and state, at the party's election to waive a second jury trial in favor of certainty, time and economy. Cf. Wright & Miller, 11 Federal Practice and Procedure, §2820, pp. 128-131; 50 C.J.S., Juries, §128e, pp. 855-6. Consider: 28 U.S.C. §2106.

Professor Moore has summarized remittitur practice as it has developed as "so universal in the trial and even the appellate courts and has the apparent approval of so many Supreme Court cases, that it cannot be contended that its use is unconstitutional without a judicial uprooting of precedent akin to that effected by *Erie-Tompkins.*" 6A Moore's Federal Practice ¶59.05[3], p. 59-49 (noted citations omitted).

Thus, petitioner's principal point is, at best, moot.

II

The Appellate Panel Correctly Found Such "Paucity of the Evidence" as to Dictate Its Remittitur.

Petitioner's lost future profit theory as presented at trial was based uniquely—at least in reported Robinson-Patman jurisprudence—on the circumstance that Skaines was forty when he gave up his tire dealership. Thus, he claimed to have been economically maimed for the balance of his business life or until his expected retirement at 65. No Sherman Act termination case to our knowledge has presented a jury with such an impermissibly speculative range from which to award the *actual* damage prescribed by *Payne*. The remitted award of $30,000 stands in vivid contrast to the jury's award of $1,150 for the *actual* profit lost in diverted sales.

To predicate damage on a proprietor's business life expectancy moves somewhere beyond speculation into sheer caprice, hardly the stuff of reasonable estimation long recognized (and adverted to in *Payne*) as permissible in Sherman Act cases where monetary damage is often imprecise. See, *e.g.*, *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946). But there was no evidence as to Skaines' profit-making ability in any other business from which the credibility of the projection could be judged; there was no proof of profit performance of any comparable business in the Memphis market; and, in fact, Skaines had a loss in his first year which ended before United started in business and, thus, before any of the claimed discrimination occurred.

Nor was there evidence that Skaines would have continued in business for 25 years, a necessary predicate to finding loss of profits over that period of time. On the contrary, since his franchise was, by its express terms, terminable by either party upon 30 days' written notice, there was just no basis for believing the business would continue for a generation.*

Assuming, but not conceding, that lost future profits, *per se*, may be recovered in a Robinson-Patman action, there still must be sufficient evidence from which the amount of lost profits can be determined with a fair and reasonable degree of certainty, without speculation or conjecture. *Webb* v. *Utah Tour Brokers Ass'n*, 568 F.2d 670, 677-678 (10th Cir. 1977); *Associated Press* v. *Taft-Ingalls Corp.*, 340 F.2d 753, 769 (6th Cir. 1965); *Elder-Beerman Stores Corp.* v. *Federated Department Stores, Inc.*, 459 F.2d 138, 150 (6th Cir. 1972); *Coleman Motor Co.* v. *Chrysler Corp.*, 525 F.2d 1338, 1351-1352 (3rd Cir. 1975). In *Volasco Products Company* v. *Lloyd A. Fry Roofing Company*, 346 F.2d 661, 666 (6th Cir. 1965), *cert. den.*, 382 U.S. 904 (1965), the mathematical projection at issue was based on the plaintiff's prior business history, unlike the projection in the instant case, which is totally conjectural.

To award antitrust damages based on projected profits, there must, at the least, be a tangible foundation from which the fact finder can determine that a reasonable probability exists that profits would have been made. *Webb*, *supra*, 568 F.2d at 677. A mere estimate of lost profits

* On remand in *Payne*, the Fifth Circuit rejected, as a damage concept, expert testimony as to going concern values projected for 20 years. 670 F.2d 575 (1982).

cannot be sufficient in this respect, especially where (as in the instant case) there never were any profits. See *Baush Machine Tool Co.* v. *Aluminum Co. of America,* 79 F.2d 217 (2d Cir. 1935).

In *Albrecht* v. *Herald Company,* 452 F.2d 124 (8th Cir. 1971), the Court, at 131, stated:

> Certainly the anti-trust laws in dealing with damages are not intended to give a person a life annuity in addition to whatever actual damage a party might have suffered in its business property. *The injury is to the business and not to the person.* (Emphasis supplied.)

In *Simpson* v. *Union Oil Company of California,* 411 F.2d 897 (9th Cir. 1969), *rev'd on other grounds,* 377 U.S. 13 (1969), the trial court's disallowance of lost future profits based on the plaintiff's projection of earnings over his life expectancy was affirmed because the plaintiff there, as with Skaines here, had not been personally disabled or otherwise rendered unable to earn an income for his remaining life.

In the instant case, Skaines' claim for lost future profits, as submitted to the jury, was $336,400, and the jury award was $205,200. Since the District Court did instruct the jury to discount damages for lost future profits to present value, it appears that the jury based its award on something approaching 25 years. The appellate panel then provisionally reduced this verdict, in effect, to $30,000.

The fundamental and fatal error lay in inviting the jury to speculate on anything as irrational as a 25-year life expectancy in the first place. Indeed, no part of an award proceeding from such induced speculation should have been allowed to stand.

It is submitted that the trial judge or the appellate panel could at least have ordered a new trial as to damages; surely remittitur was a justifiable, constitutional alternative to put to petitioner's option.

Conclusion

Although the clear mandate of *Payne* was palpably averted in the affirmance of the "automatic damages" awarded Skaines for price differentials and further muddied in the allowance of some lost future profits as, presumably, additional *actual* damage—and with all now standing as condoned by this Court's denial of Uniroyal's petition in No. 1949—the cross-petition should now also be denied.

Respectfully submitted,

SIDNEY P. HOWELL
THOMAS F. JOHNSTON
Attorneys for Respondent

Of Counsel:

GERALD M. GURA
ARTHUR, DRY & KALISH P.C.
1230 Avenue of the Americas
New York, New York 10020

and

BARRY F. WHITE
ARMSTRONG ALLEN BRADEN GOODMAN
McBRIDE & PREWITT
1900 One Commerce Square
Memphis, Tennessee 38103

July 7, 1982